Supreme Court, U.S.
FILED

117

No. (1) 08-633

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In The

Supreme Court Of The United States

IN RE ALONZO AUSTIN,
EXECUTOR FOR RUTH H. LEWIS,
ESTATE.

Petitioners.

On Petition For A Writ Of Mandamus
Or In The Alternative Prohibition
Directed To The Honorable Myron H.
Thompson, Judge Of The United States District
Court For The Middle District Of Alabama, Eastern
Division.

PETITION FOR A WRIT OF MANDAMUS

ALONZO AUSTIN, PROSE
1321 Oliver-Carlis Rd.
Tuskegee, AL 36083
(334) 727-5476

QUESTIONS PRESENTED

1. Whether the Honorable Myron H. Thompson, had power to enter the order of July 18, 2007.

2. Whether the above-mentioned Federal District Courts Order Pursuant to 28 U. S. C. §1915(e), on July 18, 2007, dismissing all prose petitioners, §1983 Federal Claims, against Modern Woodmen of America et, al, with Prejudice, violated Prose Petitioners, VII Amendment rights to the U. S. Constitution, for Civil damages of $2,000,000.00, without benefit of jury trial, as demanded pursuant to Fed. R. Civ. P. 38(b), as guaranteed.

3. Whether the above-mentioned order (Id.), also violated Prose Petitioners XIV, Amendment due process rights to the U. S. Constitution, as guaranteed, given it's **"BLACK ON BLACK VENUE."**

4. Whether the above-mentioned order (Id.), violated Prose Petitioners V, Amendment rights of due process to the U.S. Constitution, as guaranteed.

5. Whether under the equal protection clause an African American Probate Court Judge, conspiring with others could lawfully convert an African American Principal's Estate, under a "Law of Agency", into a "Ward of State", seizing all liberty, immunity and property interest, for personal gain by decree, without affending the Fourteenth Amendment.

6. Whether this case presents a question of Law that was never considered by any court and thus is not influenced by the **"Doctrine of Stare Decisis."**

7. Whether this court should exercise its jurisdiction to prevent enforcement of the above-mentioned order and to compel its vacation by issuance of A Writ of Mandamus and/ or Prohibition in aid of its appellate jurisdiction.

PARTIES TO THE PROCEEDING

Petitioners:

Alonzo Austin, Executor For Ruth H. Lewis, Estate:

Respondents:

MODERN WOODMEN OF AMERICA
PROBATE JUDGE: ALFONZA MENEFEE
CIRCUIT JUDGE: HOWARD F. BRYAN
ATTORNEY: DEBORAH H. BIGGERS
GUARDIAN/CONSERVATOR: JUANITA K. UPSHAW
INSURANCE AGENT: GEORGE CLAY
DOCTOR: ROBERT H. STORY, M.D.
ATTORNEY: FRED GRAY, SR.
ATTORNEY: ALLAN NATHANSON
MASON MANOR: ASSISTED LIVING FACILITY
TUSKEGEE: CITY POLICE
MACON COUNTY: SHERIFF
MONTGOMERY: CITY POLICE
ALABAMA STATE: BOARD OF LICENSURE
ALABAMA EXCHANGE BANK: and PRESIDENT
ROBERT DAVIS
SOUTHTRUST BANK: and its PRESIDENT
REGIONS BANK:
AETNA INSURANCE CO. et, al
KAY IVEY, ALABAMA STATE TREASURER

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OFFICIAL REPORT OF OPINION BELOW

The opinion of the Honorable Myron H. Thompson, of the United states District Court for the Middle District of Alabama, Eastern division, is unreported

JURISDICTION

Jurisdiction to grant the Writs of Mandamus and/or Prohibition, sought here by Petitioners, to prevent enforcement of the order entered by respondent, the Honorable Myron H. Thompson, District Court Judge, on July 18, 2007, is conferred on this court by the provisions of Section 1651(a) Title 28, United States Code (28 U.S.C.A. §1651(a) and Rules of this Court (S Ct. Rule 20), to aid in Appellate Jurisdiction.

BASIS OF DISTRICT COURT JURISDICTION

Jurisdiction is conferred on the District Court to entertain the present action pursuant to 18 U.S.C.§§§1331, 1332, §1343(a)(3) AND 42 U.S.C. §1983.

CONSTITUTIONAL PROVISIONS AND STATUES

A. CONSTITUTIONAL PROVISIONS

The FIFTH AMENDMENT, to the United States Constitution, part of the Bill of Rights, that establishes certain protections for citizens from actions of the government by providing that neither Life, Liberty nor Property maybe taken without due process of Law...

The SEVENTH AMENDMENT, to the United States Constitution that Guarantees the right to a Jury Trial in any Civil Case before a Federal Court if the amount in controversy exceeds $20. Each civil litigant in a federal court is entitled to a jury of twelve persons before a Judge.

Capable of instructing them on the Law, and a unanimous Verdict, 174 U.S. 1, 15. Antieau. Modern Constitution Law § 7:17 (1969). However trials by Jury is not automatic; rather, a party must specifically request it Fed. R. Civ. Proc. 38.

The FOURTEENTH AMENDMENT, to the United States Constitution, which guarantees that all persons born in any state of the United States, and are guaranteed the privileges and immunities due to citizens of the United States and to due process. And equal protection of the Laws.

B. STATUTES

28U.S.C.S. §1915, Volume 28 page 369
42 U.S.C.A. §1983 Volume 42 page 9

Copies of the above-cited statutes pertinent texts are set forth in appendix "G" and "H" to this petition.

STATEMENT OF THE CASE

1. This petitions is filed pursuant to the authority to issue extraordinary Writs Vested in this Court by the provisions of Section 1651(a), Title 28, United states Code, and rule 20 of the Rules of this Court, to aid in Appellate Jurisdiction, in order to prevent enforcement by the Honorable Myron H. Thompson, a Judge of the United States District Court for the Middle District of Alabama, Eastern Division.

Respondent here, of his order entered on July 18, 2007, in the case of Alonzo Austin, Executor for Ruth H. Lewis Estate vs. Modern Woodmen of America et, al., being civil action no. 3:07-CV-00138-MHT-TFM, of Such District Court, pending before respondent, and to compel respondent to vacate the order for the reason that respondent had no power to enter the order.

As is more fully alleged and argued below. A copy of such order of July 18, 2007, is included in appendix "B" to this petition, together with a copy of the magistrates report and recommendations entered on May 23, 2007, included in appendix "C" to the petition. The Eleventh Circuit Court of Appeals opinion of May 2, 2008. Affirming District Courts order of July 18, 2007, is also included in appendix "A" as well as its Denial of Rehearing and hearing enbanc, in appendix "D" to this petition, as unpublished.

2. There are also included in the Appendix "E" and "F" papers which are essential to an understanding of the instant petition.

Petitioners, Durable General Power of Attorney and Macon County of Alabama Probate Judge Alfonza Menefee's, order of July 6, 1993, declaring null and void, petitioners in Durable General Power of Attorney prepared by Legal Counsel Albert C. Bulls III, excuted by Petitioner, Ruth H. Lewis on February 2, 1993.

3. On February 6, 1991, Ruth H. Lewis completed an application for a Modern Woodmen Annuity Certificate #6737108 with proceeds payable on her death. She named as beneficiary petitioner, Alonzo Austin.

On February 2, 1993, Ruth H. Lewis, executed a Durable General Power of Attorney, naming petitioner Alonzo Austin, her attorney-in-fact, prepared by her legal counsel Attorney Albert C. Bull III.

On March 3, 1993, Probate Court Judge Alfonza Menefee refused to record and certify the above-mentioned Durable General power of Attorney, prepared by Albert C. Bulls III, as disclosed.

On April 28, 1993, Probate Court Judge Alfonza Menefee found that principal Ruth H. Lewis, was legally incompetent and named Juanita K. Upshaw, as her guardian and conservator, over "Principal Ruth H. Lewis's Estate."

On June 4, 1993, Juanita Upshaw, filed a petition with Probate Court Judge, Alfonza Menefee, to set aside the "Durable General Power of Attorney", granted to Alonzo Austin, arguing that "Principal Ruth H. Lewis", was not mentally competent at the time and executed it under duress.

On June 29, 1993, a hearing on petition was held" Petitioners Alonzo Austin", appeared as "Attorney-in-Fact", with "Principal Ruth H. Lewis", Juanita K. Upshaw appeared and was represented by Attorney Deborah H. Biggers, after a letter was read by Probate Court Judge, Alfonza Menefee, from Dr. Robert H. Story, M.D., claiming "Principal Ruth H. Lewis", had been mentally incompetent for at least a year.

The above court declared the instrument in question null and void on July 6, 1993.

Moreover, the order stated any and all personal property, documents, keys and other items, belonging to "Principal Ruth H. Lewis" in possession of "Petitioner Alonzo Austin", shall be turned over to Juanita K. Upshaw, the courts appointed guardian/conservator, and that "Petitioner Alonzo Austin", was not to interfere...

On September 15, 1993, "Petitioner Alonzo Austin" was arrested by Probate Court Judge Alfonza Menefee on his job at the Tuskegee V.A. Medical Center, pursuant to 12-13-9 Criminal Code of Al. 1975, under an order of contempt, September 7, 1993.

On February 9, 1994, "Principal Ruth H. Lewis", was forcibly removed from her residence by probate Court Judge Alfonza Menefee and others.

On March 4, 1994, the above-mentioned Court and others, removed from Principal Ruth H. Lewis's, bank account $72,810.69 according to Southtrust Banks documentation, with $85,000.00 unaccounted for in Alabama Exchange Bank.

On April 30, 1994 or their about petitioner located "Principal Ruth H. Lewis" in Montgomery County Alabama, being held against her will in "Mason Manor", "an assisted living facility", approximately a month after circuit Court Judge Howard F. Bryan, divested "Agency" of a vehicle.

On June 10, 1994, Petitioner Attempted to remove "Principal Ruth H. Lewis" from "Mason Manor", under "Agency's" power, but was forcible and viciously separated by the "Montgomery City Police" and ordered never to return to premises, after examing instrument certified by "Montogmery's Probate Court".

On November 26, 1994 Principal died as a Testatrix and in December 1994, her estate was converted intestate.

On February 7, 1995, Petitioner Alonzo Austin, received a letter courtesy of Attorney Fred Gray, Sr., from the City of Tuskegee, evidencing an Ambulance Bill for service regarding the transporting of Testatrix, Ruth H. Lewis's, remains on November 26, 1994. Probate Court Judge Alfonza Menefee, Juanita K. Upshaw, and others, inquired about Testatrix Ruth H. Lewis's, Annuity, naming Petitioner, Alonzo Austin, as beneficiary on February 6, 1991, in the original amount of $10,000.00, via a letter to Modern Woodmen, on July 10, 1996.

On October 31, 2005, the above-mentioned annuity proceeds were transferred by Modern Woodmen of America to state Treasurer's, Kay Iveys, office under the Alabama Uniform Disposition of Unclaimed Property Act. Giving rise to this 42 USC §1983, Complaint in Federal District Court, on February 14, 2007, Case #: 3:07-CV-138-MHT-TFM.

Finally, on July 18, 2007, Federal District Court Judge the Honorable Myron H. Thompson, dismissed case under 28 USC 1915(e) without Jury trial as demanded by Petitioners pursuant to Fed. R. Civ. P. 38(b), as guaranteed by the VII Amendment to the U.S. Constitution, against Modern Woodmen of America et,al. which included Macon County Probate Judge Alfonza Menefee and Macon County Circuit Judge Howard F. Bryan, for breach of duty pursuant to §12-13-1 Code of Ala. 1975, on March 3, 1993.

And for declaring null and void on July 6, 1993, "Petitioners Durable General Power of attorney" Executed on February 2, 1993, by "Ruth H. Lewis", naming Petitioner, "Attorney-in-Fact", prepared by "Attorney Albert C. Bulls III", pursuit to . §26-1-2 (a) and (b) code of Ala. 1975, "This Statute Prohibited Probate Courts Order"!, of the 28th day of April 1993, issuing **LETTERS OF CONSERVATORSHIP AND GUARDIANSHIP** over "Principal Ruth H. Lewis Estate", converting all Real and Person Property for Personal gain.

REASONS RELIED ON FOR ALLOWANCE OF WRITS

1. The issues involved in the present proceedings are of exceptional character and of great public importance in that the above-mentioned Federal District Courts order of July 18, 2007, prevents the prose petitioners from receiving a trial by jury as demanded pursuit to Fed. R. Civ. p. 38(b), and guaranteed by Vll Amendment to the U.S. Constitution, given the fact that all issues in the above-mentioned case for jury consideration are state court orders, involving petitioners private business affairs as agent, for the principal, of an executed "Durable General Power of attorney", prepared by Petitioners, "Legal Counsel", and "voided by a Probate Court".

Thus this case qualifies as a "First Impression Case", if it presents a question of Law, that has never been decided by any "Court", Therefore, the above-mentioned court order is, an exception to the VII Amendment Jury Guarantee and injurious to the public good, and it can not stand without affending Amendment VII, and pro se, poor people, who seeks civil remedies in the "State of Alabama", against Judges, Bankers, Lawyers, Doctors, Police and Sheriff Officers etc. etc.

2. The relief sought by this petition is in aid of Appellate Jurisdiction and is not available, and there is no adequate remedy, in the Court of Appeals, or any other Court, other than this Court, for the following reasons. (1) The 11th Circuit Court of Appeal affirmation of the District Courts opinion. On May 2, 2008, finding no reversible error when District Court only considered the face of Petitioners Complaint, with no mention of Consideration given to Attachment #1 Ex "A" and #2 Ex. "B" conflicts with its decision in Trust Mark II., and Fed. R. Civ. P. 10(C). Cited as "Trustmark Ins. Co. V. Eslu, Inc." 299 F. 3d. 1265, 1267 (11th Cir 2002).

and (2) the record demonstrates there were (3) three magistrates assigned to Pro Se Petitioners Case, the first being Judge Wallace Capel, Jr., for action or recommendations on all pretrial maters, signed by (Judge Myron H. Thompson, on 2/16/07, DKT #2),

On 3/15/2007, case reassigned to Judge Charles S. Cooly. With (no DKT #) or explanation as to the changes in Magistrates. Finally, on May 18, 2007, case was again reassigned this time to Judge Terry F. Moorer, with (no DKT #) and (5) days, later Judge Terry F. Moorer, issued its Report and Recommendations, on May 23, 2007, (DKT #90), before (DKT #91) Motion to Quash Service by Circuit Judge Howard F. Bryan, entered on 5/24/2007, as well as (DKT #92,) Motion to dismiss City of Tuskegee Police on 5/24/2007.

It appears Magistrates Judge Terry F. Moorer, had little time to consider much more than the face of Petitioner Complaint, if that, leaving Petitioners Attachments (#1 Ex A) and #2 Ex B) as well as its Motions for summary Judgments with Affidavits and Exhibits attached pursuant to Fed. R. Civ. P. 56(e) in response to the former Magistrate Judges Charles S. Coody's "orders to Show Cause" (DKTs # 44, 45, 53, 55, 57, 61 and 67.) With its abbreviated considerations which conflicts with Trustmark II, "Conversion Rule".

The Eleventh Circuit Court of Appeals, on the aforementioned issues above denied Petition for Rehearing and Hearing Enbanc, on July 29, 2008, giving rise to this "Writ of Mandamus", to highlight the corrosive and deteriorating Judicial System, in Macon County, (Tuskegee) Alabama.

Where Blacks are in this case, the Judges, Circuit Clerks, Commissioners, Mayor, Councils Persons, Lawyers, Sheriff, Police Chief, and Bankers, and when as the within petitioners, did go to "Federal Court" for our legal remedies as provided to us by the "U.S. Constitution a Black Judge", is there also blocking, our access to the "Federal Courts", much like "Gov. George Wallace", blocked School House Doors!!!

3. STATEMENT OF REASONS SUPPORTING ALLOWANCE FOR WRITS.

A. There is a clear Legal right in petitioners to the above-mentioned order sought, pursuant to Fed. R. Civ. P. 38(b) in actions for damages under 42 USCS §1983, Seventh Amendment requiring Jury Trial upon demand where amount in Controversy exceeds $20, Burt v. Abel (1978 CA $ SC) 585 F. 2d613 18 CCH EPD 8833.

B. There exist an imperative duty upon the respondent to perform accompanied by refusal to do so given the decision in TRUSTMARK II, in that case, when ESLU submitted its 12(b)(6) motion to dismiss TRUSTMARK II, it attached various documents in support.

Trustmark attached further documentation in its response. Without expressly excluding any of the documents, the district court dismissed the suit: Trustmark appeals.

Trustmark argues that when the district court accepted all of the documentation provided at the 12(b)(6) stage, it considered matter outside the pleadings, thus converting that motion into a motion for Summary Judgment.

Because a court converting a 12(b)(6) motion into a motion for Summary Judgment must give the parties 10 days Notice, and Trustmark, was not given that Notice. Trustmark, argued that the case should be reversed and remanded.

Also Fed. R. Civ. P. 10(c) in concert with Conversion Rules states document attached to pleading is a part there of, thus as in Trustmark II, the instant case should have been reversed and remanded.

CONCLUSION

WHEREFORE petitioner request that this Court issue a Writ of Mandamus and/or a Writ of Prohibition, as this Court may deem appropriate, directed to the Honorable Myron H. Thompson, District Judge, one of the respondents in this matter, restraining such respondent from enforcing his order of July 18, 2008, and requiring such respondent to vacate the order.

Petitioner further request that this court grant petitioners such other and further relief as it may deem to be just and equitable.

MANDAMUS

November 7, 2008

ALONZO AUSTIN, PROSE
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Ph. #: (334) 727-5476

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
May 2, 2008
THOMAS K. KAHN
CLERK

No. 07-13843
Non-Argument Calendar

D.C. Docket No. 07-00138-CV-3-MHT-TFM

Alonzo Austin, Executor for
the estate of Ruth H. Lewis,

Plaintiff-Appellant,

versus

MODERN WOODMAN OF AMERICA
ALFONZA MENEFEE, Probate Judge, in his
Individual and official capacities,
et al.,

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Alabama

(May 2, 2008)

Before TJOFLAT, ANDERSON and BLACK, Circuit Judges.

PER CUIRIAM:

"Appendix A"

Alonzo Austin, an individual proceeding pro se on behalf of his cousin's estate, appeals the district court's dismissal of his 42 U.S. C. § 1983 complaint against various defendants. As executor of his cousin's estate, Austin assets that various individuals and entities-among them, an Alabama probate court judge, several attorneys, the state medical licensing board and several banks-violated his cousin's Fourteenth Amendment rights in connection with her guardianship and housing and, ultimately, the distribution of her property upon her death in 1994.

On appeal, Austin argues that the district court erred by not construing the defendants' motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) as motions for summary judgment pursuant to Rule 56(e). He asserts this error caused him harm because had the district court decided the case under the summary judgment standard, two of the defendants, Judges Menefee and Bryan, would have been required to "prove absolute or qualified immunity." Austin also finds error in the district court's failure to consider his motion for summary judgment; he asserts that the court should have taken his allegations as true and that there was a disputed genuine issue of material fact at the Rule 12(b)(6) stage. Additionally, on appeal, Austin appears to argue the merits of the underlying probate proceedings out of which this §1983 action arose.

We review de novo an order granting motions to dismiss. Wagner v. First Horizon Pharmaceutical Corp., 464 F. 3d 1273, 1276-77 (11th Cir. 2006). In reviewing a district court's grant of a motion to dismiss, the allegations in the complaint "must be taken as true and read in the light most favorable to the plaintiffs." Linder v. Portocarrero, 963 f.2d 332, 334 (11th Cir. 1992).

"A court is generally limited to reviewing what is within the four corners of the complaint on a motion to dismiss." Bickley v. Caremark RX. Inc., 461 F. 3d 1325, 1329 n. 7 (11th Cir. 2006). Under Federal Rule of Civil Procedure 12(d), "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court,

the motion must be treated as one for summary judgment under Rule 56," Fed. R. Civ. P. 12(d) (2008). "Whenever a judge considers matters outside the pleadings in a 12(b)(6) motion, that motion is thereby converted into a Rule 56 Summary Judgment motion," Trustmark Ins. Co. v. ESLU. Inc., 299 F. 3d 1265, 1267 (11th Cir. 2002).

After careful review, we discern no reversible error. Although the parties' motions had affidavits, the record demonstrates that the district court did not consider matters outside the pleadings. The magistrate's report and recommendation, which was adopted by the district court, only considered the "face of Austin's complaint" when issuing its recommendation. The district court therefore did not err when it failed to treat the defendants' motions to dismiss as motions for summary judgment. See Bickley, 461 F.3d. at 1329 n. 7; Trustmark Ins. Co., 299 F. 3d at 1267. Because this is the only issue raised on appeal, and Austin has abandoned all other issues, the district court's order dismissing Austin's claims against the defendants is

AFFIRMED.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE

MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

ALONZO AUSTIN, etc.,

Plaintiff,

CIVIL ACTION NO. 3:07cv138-MHT

v.

MODERN WOODMAN OF AMERICA, et al.

ORDER

Upon consideration of the opinion of the United States Court of Appeals for the Eleventh Circuit entered on May 2, 2008, wherein the final judgment of this court made and entered herein on July 18, 2007 (Doc. no. 97), was in all respects affirmed; and the mandate of the United States Court of Appeals for the Eleventh Circuit issued on August 6, 2008, and received in the office of the clerk of this court on August 6, 2008 (Doc. no. 106), it is the ORDER, JUDGMENT, and DECREE of the court that the final judgment of this court made and entered on July 18, 2007 (Doc. no. 97), is continued in full force and effect.

DONE, this the 7th day of August, 2008.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

"Appendix B"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALONZO AUSTIN, executor for the
estate of Ruth H. Lewis,

Plaintiff,

v. CIVIL ACTION NO. 3:07cv138-MHT
(WO)

MODERN WOODMEN OF AMERICA,
et al.,

Defendants:

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1)(B) this case was referred to the undersigned United States Magistrate Judge for review and submission of a report with recommended findings of fact and conclusions of law (Doc. 2, filed February 16, 2007).

I. INTRODUCTION

In this 42 U.S.C. § 1983 action, Alonzo Austin ("Austin"), a pro se plaintiff, raises several claims related to the guardianship and housing of his cousin, Ruth H. Lewis ("Lewis"), in a nursing home in 1993 and the distribution of property after her death in 1994. Austin names Macon County Probate Judge Alfonza Menefee ("Judge Menefee"), Deborah H. Biggers ("Biggers"), Fred Gray, Sr. ("Gray"), Allan Nathanson ("Nathanson"), Juanita K. Upshaw ("Upshaw"), George Clay

Office, the City of Tuskegee Police Department, Macon County Sheriff's Department, Montgomery City Police Department, the Alabama. Board of Licensure, Regions Bank, SouthTrust Bank and its president, and Aetna Insurance Company as defendants.

Now pending before the court are the defendants' motions to dismiss (Doe. Nos. 25, 27, 29, 32, 33, 34, 37, 41, 46, 49, 50, 58 & 85) and the plaintiffs' responses in opposition to the motions (Doc. Nos. 62-63, 70-77; 81-82, 84). The court has reviewed the defendants' motions and the plaintiff's responses and concludes that this case should be dismissed.

II. STANDARD OF REVIEW

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one." *Scheuer v. Rhodes, 416 U.S.* 232 (1974). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Id.* "Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Id.*

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the `grounds' of his `entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a

cause of action will not do." *Bell Atlantic Corporation v. Twombly,* —-S.Ct. — , 2007 WL 1461066, 2007 U.S. LEXIS 5901 (2007) (citations omitted). In other words, factual allegations must be enough to raise a right to relief above the speculative level. *Id.* That said, the threshold for a complaint to survive a motion to dismiss is "exceedingly low." *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 703 (11th Cir. 1985).

III. DISCUSSION

A. Claims against Private Individuals & Entities

An essential element of a 42 U.S.C. § 1983 action is that the alleged constitutional deprivation was committed by a person acting under color of state law. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 119 S.Ct. 977, 985, 143 L.Ed.2d 130 (1999); *Parratt v. Taylor,* 451 U.S. 527 (1981); *Willis v. Univ. Health Servs., Inc,* 993 F.2d 837),840 (11th Cir. 1993). *See also Mills v. Criminal District Court No.* 3, 837 F.2d 677, 679 (5th Cir. 1988) ("private attorneys, even court-appointed attorneys, are not official state actors and ... are not subject to suit under section 1983.) To state a viable claim for relief under § 1983, a plaintiff must assert "*both* an alleged constitutional deprivation ... *and* that the party charged with the deprivation [is] a person who may fairly be said to -be a state actor.'" *American Manufacturers, 526 U.S.* at 50, 119 S.Ct. at 985.

It is clear from the face of Austin's complaint Modern Woodmen of America, Mason Manor, SouthTrust Bank and its president, Regions ,Bank, Aetna Insurance Company, Biggers, Gray, Nathanson, Story, Davis, Upshaw, and Clay are not state actors. Consequently, the actions about which Austin complains were not committed by a person acting

under color of state law and cannot be considered state actions which is a requisite element to assign liability under 42 U.S.C. § 1983. The court therefore concludes the claims presented against Modern Woodmen of America, Mason Manor, SouthTrust Bank and its president, Regions Bank, Aetna Insurance Company, Biggers, Gray, Nathanson, Story, Davis, Upshaw, and Clay are frivolous and subject to summary dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

B. Judge Menefee

All of the allegations made by the plaintiff against Judge Menefee arise from actions taken by Judge Menefee in his judicial capacity during court proceedings over which he had jurisdiction. The law is well established that a county probate judge is absolutely immune from civil liability for acts taken pursuant to his judicial authority. *See Forrester v. White,* 484 U.S. 219, *227-229* (1988); *Paisey v. Vitale in and for Broward County,* 807 F.2d 889 (11th Cir. 1986); *Stump v. Sparkman, 435 U.S.* 349 (1978). *See also Harvey v. Harvey; 949* F.2d 1127, 1133 (11th Cir. 1992) (noting that a county probate judge is a state actor and therefore immune from suit). Consequently, the motion to dismiss filed by Judge Menefee should be granted pursuant to FED.R.Civ.P. 12(b)(6).

C. The Alabama Board of Medical Licensure

Austin makes no specific allegations against the Alabama Board of Licensure. In addition, the Alabama Board of Medical Examiners and the Medical Licensure Commission of Alabama are state agencies. It is well-settled law that state agencies are absolutely immune from suit. *Papasan v. Allain,* 478 U.S. 265 (1986). Thus, the motion to dismiss filed by the Alabama Board of Medical Licensure

should be granted pursuant to FED.R.Civ.P. 12(b)(6). (Doc. No. 49.)

D. Claims against the Alabama State Treasurer's Office

Austin argues his constitutional rights were violated because the Woodmen of America transferred his insurance proceeds into the State Treasury pursuant to the Alabama Uniform Disposition of Unclaimed. Property Act, §§ 35-12-70 through 35-12-96, ALA. CODE1975. First, it is clear Austin makes no specific allegations against thc Alabama State Treasurer's office. Moreover, state agencies are absolutely immune from suit. *Papasan, supra.* Thus, Austin fails to state a claim against the Alabama Treasurer's Office upon which relief may be granted. Consequently, the Alabama State Treasurer's Office motion to dismiss pursuant to FED.R.CIV.P.12(b)(6) should be granted.

E. Claims against Law Enforcement Departments

Austin names the City of Tuskegee Police Department, the Montgomery County Sheriff's Department, and the Macon County Sheriff's Department as defendants in this case. The law is well settled, neither a county sheriff's department nor a city police department is a legal entity subject to suit or liability under § 1983. *See Dean v. Barber, 951* F.2d 1210, 1214 (11th Cir. 1992). In light of the foregoing, the court concludes that the plaintiffs claims against the City of Tuskegee Police Department, the Montgomery County Sheriffs Department, and the Macon County Sheriffs Department are due to be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). *Id.*

F. Supplemental State Law Claims

To the extent Austin's allegations may be construed as state law claims, his contentions are due to be dismissed. If the federal claims over which the court has original jurisdiction are dismissed, the court may decline to exercise jurisdiction over state law claims. See-28 U.S.C. § 1367(c)(3); *McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1227 (11th Cir. 2002). In view of this court's determination that the federal claims presented in Austin's complaint should be dismissed, the court concludes that his supplemental state law claims are also due to be dismissed. *Id.*

IV. CONCLUSION

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that:

1 The Alabama Board of Medical Licensure's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) be GRANTED. (Doc. No. 49.)

2. The Alabama State Treasury's motion to dismiss pursuant to FED.R.CIV.P.12 (b)(6) be GRANTED. (Doc. No. 50)

3. The § 1983 claims against the remaining defendants be **DISMISSED** as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

4. Austin's supplemental state law claims be **DISMISSED without prejudice.**

5. The motions to dismiss filed by defendants Gray, Nathanson, Menefee, Diggers, Davis, Macon Sheriff's

Department, Regions Bank, SouthTrust Bank and its president, Modern Woodmen of America, Macon County Sheriffs Department, and the Alabama State Board of Licensure be **DENIED** as moot, (Doc. Nos. 25, 27, 29, 32, 33, 34, 37, 41, 46, 58 & 85.)

6. The motion to stay filed by Macon County Sheriff's Department and Alfonza Menefee be **DENIED as moot.** (Doc. No. 65.)

7. This case be **DISMISSED.**

8. Any remaining outstanding motions be **DENIED as moot.**

It is further **ORDERED** that the parties are **DIRECTED** to file any objections to the said Recommendation not later than **June 5, 2007.** Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this Recommendation is riot a final order of the court and, therefore, it is 'riot appealable.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from *a de novo* determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted 'or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright,* 677 F.2d 404 (5th Cir. 1982); *see Stein v. Reynolds Securities, Inc.,* 667 F.2d 33 (11th Cir. 1982); *see also Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981, *en banc*), (adopting as binding precedent all of the

decisions of the former Fifth Circuit handed (down prior to the close of business on September 30, 1981}.

DONE this 23rd day of May, 2007.

/s/Terry F. Moorer
TERRY F. MOORER
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-13843-BB

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

July 29 2008

THOMAS K. KAHN
CLERK

ALONZO AUSTIN, Executor for the estate of Ruth H. Lewis,

Plaintiff-Appellant,

versus

MODERN WOODMAN OF AMERICA, ALFONZA MENEFEE, Probate Judge, in his individual and official capacities,et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION (S0 FOR REHEARING AND PETITION (S) FOR REHEARING EN BANC

Before: TRJOFLAT, ANDERSON and BLACK, Circuit Judges.

PER CURIAM:

"Appendix D"

The Petition (s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate procedure), the Petition (s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ (Signature Unclear)
UNITED STATES CIRCUIT JUDGE

State of Alabama
County of Macon

Durable General Power of Attorney

KNOW ALL MEN BY THESE PRESENTS, which are intended to constitute a DURABLE GENERAL POWER OF ATTORNEY, that I, RUTH H. LEWIS, whose address is P.O. Box 265, 1401 Martin Luther King Highway, Tuskegee, AL 36083, do hereby make, constitute and appoint my cousin, ALONZO AUSTIN whose mailing address is Rte. 3 Box 365, Tuskegee. AL 36083, my true and lawful Attorney-in-Fact, for me and in my name, place and stead, and on my behalf and for my use and benefit and to perform the following duties, to wit:

To exercise or perform any act, power, duty, right or obligation whatsoever that I now have, or may hereafter acquire the legal right, power or capacity to exercise or perform, in connection with, arising from, or relating to any person item , transaction. thing, business property, real or personal, tangible or intangible, or whatsoever.

To request, ask, demand, sue for, recover, collect, receive and hold and possess all such sums of money, debts, dues, commercial paper, checks, drafts, accounts, deposits, legacies, bequests, devises, notes, interests, stock certificates, bonds, dividends, certificates of deposit, annuities, pension and retirement benefits, insurance benefits and proceeds, any and all documents of title, choses in action, personal and property rights, and demands whatsoever, liquidated or unliquidated, as now are, or belonging to me, or in which I have or may hereafter acquire interest, to have, use and talk all lawful means and equitable and legal remedies, procedures and writs in my name for the collection and recovery thereof, and to adjust, sell, compromise and agree for the same, and to make, execute and deliver for me, on my behalf, and in my name all

endorsements, acquittances, releases, receipts or other sufficient discharges for the same;

To lease, purchase, exchange, and acquire, and to agree, bargain and contract for lease, purchase, exchange and acquisition of and to accept, take, receive and possess any real or personal property whatsoever, tangible or intangible, or interest thereon, on such terms and conditions, and under such covenants, as my Attorney-in-Fact shall deem proper;

I grant to my said Attorney-in-Fact full power and authority to do, take and perform all and every act and thing whatsoever requisite, proper or necessary to be done, in the exercise of any of the rights and powers herein granted, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that my said Attorney-in-Fact, or his substitute shall lawfully do or cause to be done by virtue of this power of attorney and the rights and powers herein granted;

This instrument is to be construed and interpreted as a DURABLE AND GENERAL POWER OF ATTORNEY. The enumeration of specific items, rights, acts or powers herein is not intended to, nor does it, limit or restrict, and is not be construed or interpreted as limiting or restricting, the general powers herein granted to my said Attorney-in-Fact.

The rights, powers and authority of my said Attorney-in-Fact herein granted shall commence upon my signing this Power of Attorney and, in addition, said Power of Attorney shall be in full force and effect upon the disability, incompetency or incapacity of the said principal, RUTH H. LEWIS, and such rights, powers and authority shall remain in full force and effect until the death of the principal, RUTH H. LEWIS. Any action taken in good faith pursuant to the

foregoing authority without actual knowledge of my death shall be binding upon me, me heirs, assigns and personal representatives.

Done this 2nd day of February, 1993.

/s/ Ruth H. Lewis
Ruth H. Lewis

STATE OF ALABAMA)
)
COUNTY OF MACON)

I, ALBERT C. BULLS III, a Notary Public in and for said County in said State, hereby certify that RUTH H. LEWIS, whose name is signed to the foregoing DURABLE GENERAL POWER OF ATTORNEY and who is known to me, acknowledge before me on this day that, being informed of the contents of said DURABLE GENERAL POWER OF ATTORNEY, he executed the same voluntarily on the day the same bears date.

Given under my hand this 2nd day of February 1993.

/s/ Albert C. Bulls III
Albert C. Bulls III, Notary Public
My Commission Expires: 4/7/94

THIS INSTRUMENT WAS
PREPARED BY
ALBERT C. BULLS III
P.O. BOX 1233
TUSKEGEE INST., AL 36088-1233
TELEPHONE 205-727-1074

IN THE PROBATE COURT OF MACON COUNTY, ALABAMA

IN RE: The Conservatorship And)
Guardianship of Ruth H. Lewis,)
An Incapacitated Person)

ORDER VOIDING POWER OF ATTORNEY GIVEN BY RUTH H. LEWIS TO ALONZO AUSTIN

On April 28, 1993, this Court, following a hearing, found that Ruth H. Lewis was incapable of handling her own affairs, and pursuant to the Alabama Uniform Guardianship and Protective Proceeding Act, appointed Juanita K. Upshaw as the Conservator and Guardian over the estate of Ruth H. Lewis.

In her capacity of Guardian and Conservator, Juanita K. Upshaw was made aware that on February 2, 1993 Ruth H. Lewis had given a Durable Power of Attorney to Alonzo Austin, even though Ms. Lewis was mentally incompetent at the time she executed the February 2, 1993 Power of Attorney.

In order to protect the interest and estate of Ruth H. Lewis, her duly appointed Conservator and Guardian filed a Petition to Set Aside and declare void the February 2, 1993 Power of Attorney.

A hearing on said petition was held on June 29, 1993, following notice to all interested parties.

Mr. Alonzo Austin appeared pro se; Ms. Juanita K. Upshaw appeared and was represented by her attorney, Deborah Hill Biggers; the ward, Ruth H. Lewis, was present, as well as other interested family members of Ruth H. Lewis.

The Guardian presented medical evidence from Dr. Robert Story that ward, Ruth H. Lewis has been mentally

incompetent for at least a year, from June 1992 which includes February 2, 1993 when said Durable Power of Attorney, appointing Alonzo Austin her Attorney-in-Fact was executed.

Further testimony was presented by Alonzo Austin, stating that he agreed with this Court's action appointing Juanita K. Upshaw as ward's Guardian and Conservator, and that he did not oppose the setting aside and declaring void, the February 2, 1993 Power of Attorney.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

(1) The February 2, 1993 Durable Power of Attorney executed by Ruth H. Lewis, appointing Alonzo Austin her Attorney-in-Fact, is hereby declared null and void, and he is to exercise no further authority, powers or duties, pursuant to said voided Durable Power of Attorney;
(2) Ruth H. Lewis was mentally incompetent to execute said Durable Power of Attorney on February 2, 1993;
(3) Said February 2, 1993 Durable Power of Attorney is null and void due to this Court's subsequent appointment on April 28, 1993, of Juanita K. Upshaw as Guardian and Conservator of Ruth H. Lewis, an incapacitated person, pursuant to the Alabama Uniform Guardianship and Protective Proceeding Act;
(4) That alone Alonzo Austin shall immediately convey title of ward's vehicle, to the Estate of Ruth H. Lewis, and provide proof of same to this Court and to Guardian;
(5) Any and all personal property, documents, keys and other items belonging to or pertaining to Ruth H. Lewis, in the possession of Alonzo Austin, shall be turned over to Guardian and Conservator, Juanita K. Upshaw, within seven (7) days from the date of this Order; and
(6) Alonzo Austin shall engage in no conduct or actions to interfere with the duly authorized powers of Juanita

LET A COPY OF THIS ORDER BE SERVED ON ALL INTERESTED PARTIES.

DONE THIS 6 DAY OF July, 1993.

/s/ Alfonza Menefee
Alfonza Menefee
Macon County Probate Judge

The State of Alabama
Macon County
Under my hand and seal this 6 day of
July 6 1993

/s/ Alfonza Menefee
Judge of Probate

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Not withstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that __

(A) The allegation of poverty is untrue, or

(B) the action or appeal__

(i) is Frivilous or malicious

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

42 U.S.C.S. §1983

§1983. Civil action for the depriving of rights

Every person who under color of any statute, ordinances regulaton, customes or usage of any State or Territory or the District of Columbia. Subjects or causes to be subjected any citizen of the United states or other person within the jurisdiction thereof to the deprivation of any, rights privileges or immunities.

Secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a Judicial Officer for an act or Omission taken in such Officer's Judicial Capacity.

Injuctive relief shall not be granted unless a declaratory Decree was violated or declaratory relief was unavailable. For purposes of this Section, any act of congress applicable exclusively to the District of Columbia shall be considered to be a State of the District of Columbia.

"Appendix H"